ness, I think he probably meant that such statement must be taken as evidence by the Inquiry Magistrate if it was produced in support of the prosecution's case at the preliminary inquiry, though the question of the admissibility of the statement in evidence could be left to the trial court at the trial of the accused persons. The learned deputy also referred to section 422 of the Criminal Procedure Code and here again, if I had understood him correctly, he said that the accused persons might not be committed for trial on the tentative charge without the statement in question.

Having considered this matter carefully as well as the arguments of all three learned defence counsel and the learned Deputy Public Prosecutor, I came to the conclusion that the newly amended section 113 of the Criminal Procedure Code only applies to admit statements made by any person charged with any offence to a police officer of or above the rank of Inspector as evidence at his trial only. The hearing and taking of evidence for the prosecution at preliminary inquiries into cases triable by the High Court are provided for in section 139 of the Criminal Procedure Code, which is as follows:—

"139. (i) When the accused person is brought before him the Magistrate shall proceed to hear the case for the prosecution and to take all such evidence as may be produced in support thereof and such other evidence as the Magistrate may think fit to call for.

(ii) Nothing in this section shall prevent evidence being produced in support of the prosecution or called for by the Magistrate at any stage of the proceedings provided that an opportunity is given to the accused to cross-examine and to answer and rebut such evidence.

(iii) If the Magistrate calls for other evidence than that produced in the case for the prosecution he must record the fact on the depositions stating shortly the nature of the evidence he has called for.

(iv) If the officer or other person conducting the prosecution applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or other thing the Magistrate shall issue such process unless for reasons to be recorded he deems it unnecessary to do so."

As the provisions of the amended section 113(1) of the Criminal Procedure Code do not apply to preliminary inquiries, I am of the view that when a Magistrate proceeds to hear the case for the prosecution at a preliminary inquiry, he is still bound by the provisions of the Evidence Act, which apply to all judicial proceedings, and he can only take such evidence as may be produced in support of the prosecution's case provided that such evidence is legally admissible under the provisions of the said Evidence Act. In this case, section 26 of the Evidence Act is applicable and in the absence of any express provision, such as section 113(1) of the Criminal Procedure Code, contained in any other written law, a statement which amounts to a confession made by any person whilst he is in the custody of a police officer is not admissible unless it was made in the immediate presence of a President of a Sessions Court or Magistrate.

One other point, which had to be considered, was whether the order of the Inquiry Magistrate in admitting the said statement (Exhibit P53) should be reversed and in doing so I had to consider whether the improper admission of the said statement had occasioned a failure of justice. I had in mind the case of *Rex* v. *Tay Choon Huat*,[3] in which the accused was convicted under section 40 of the Liquors Revenue Ordinance for storing on his licensed premises dutiable liquor. The only point taken on appeal was that the certificate of the Chemist, Singapore, was not admissible in evidence under section 424 of the Singapore Criminal Procedure Code. It was argued that the fault was covered by section 440 of the Singapore Criminal Procedure Code (which is equivalent to section 422 of our Criminal Procedure Code), and that the error in the certificate merely amounted to this, that there was the improper admission of evidence and that this omission had not occasioned a failure of justice. For the appellant it was pointed out that if the certificate had not been admitted in evidence, there was no case at all. Murray-Aynsley C.J. held in an oral judgment that it could not be said that the improper admission of the disputed evidence in this case had not occasioned a failure of justice and the appeal was allowed. In this case, I also had in mind what I understood the learned deputy to have said, namely, that without the statement in question, the accused persons might not be committed for trial on the tentative charge. In my view, therefore, it would occasion a failure of justice if the accused persons were committed and had to go through the agony of standing trial in the High Court on the tentative charge of murder merely because of the improper admission of a statement made to a police officer which cannot be taken as evidence at a preliminary inquiry. However, it is for the Magistrate himself in this case to consider all other legally admissible evidence taken by him in the preliminary inquiry and then to decide under the provisions of sections 140, 141, 142 and 143 of the Criminal Procedure Code whether to discharge or commit the accused persons for trial on the tentative charge or on any other charge or charges. In the circumstances of this case and for the reasons stated above, I therefore ruled that the said statement marked Exhibit P53 should not have been taken as evidence and directed the Inquiry Magistrate to expunge it from the record of the proceedings before him and thereafter to proceed to complete the preliminary inquiry.

Order accordingly.

Solicitors: *Karpal Singh & Co.; R. Rajasingam & Co.; Jag-Jit Singh & Co.*

TELOK SABANG (1967) BHD. v. GOVERNMENT OF MALAYSIA

[O.C.J. (Yusoff J.) March 31, 1978]

[Kuching — Civil Suit No. K. 63 of 1971]

Government Proceedings — Emergency — Tort — Armed Forces — Negligence caused by fire — Emergency (Essential Powers) Ordinance 1969, s. 5 — Government Proceedings Ordinance, 1956, s. 6(2).

Tort — Negligence — Fire — Emergency — Armed forces in occupation of sawmill — Fire occurred after 31 hours after army had left — Whether armed forces responsible — Emergency (Essential Powers) Ordinance, 1959, s. 5 — Government Proceedings Ordinance, 1956, s. 6(2).

This suit arose from the occupation by the armed forces of the plaintiff's sawmill in 1971. The plaintiff claimed damages in consequence of a fire destroying the said sawmill. It was not disputed that because of the security situation in the area one platoon from the Royal Military Forces occupied

an empty shed belonging to the sawmill on February 23, 1970 for the purpose of conducting a military operation in the area. It was also not disputed that at the time of such occupation the sawmill and the shed had been abandoned by the owners and their employees because of the curfew in the area. It was again not disputed that the platoon vacated and left the shed at about 4.00 o'clock in the morning of May 28, 1970 and that the fire broke out in the main building of the sawmill at about 11.00 o'clock in the morning of May 29 i.e. some 31 hours later.

The main issues in the claim were whether the armed forces and consequently the government by neligence caused the fire to the sawmill; whether the government was absolved from any liability in view of section 5 of the Emergency (Essential Powers) Ordinance 1969 read with section 6(2) of Government Proceedings Ordinance 1956; and the quantum of damages if they were so negligent and not absolved. The next issue was whether the armed forces were negligent when the fire broke out at the sawmill.

Held: (1) the indemnity provided in section 5 of the Emergency (Essential Powers) Ordinance did not cover the act of taking possession and occupation of the shed belonging to the sawmill by the armed forces in the present case;

(2) considering the intervening period between the time when the soldiers vacated the shed and the time when the fire took place at the sawmill there were opportunities for other factors to occur which could have caused the fire to the sawmill. For these reasons it could not be said that the defendant was negligent as alleged.

Cases referred to:-

(1) *Government of Malaysia* v. *Mahan Singh* [1975] 2 M.L.J. 155.

(2) *Johnson Tan Han Seng* v. *Public Prosecutor* [1977] 2 M.L.J. 66.

(3) *Zahrah bte Hussin* v. *Government of Malaysia* [1978] 2 M.L.J. 63.

CIVIL SUIT.

C.E. Lee for the plaintiffs.

Stanley Issac (Federal Counsel) for the defendant.

Yusoff J.: This suit arises from the occupation by the armed forces, of Telok Sabang sawmill at Telok Sabang, Samarahan, First Division, Sarawak, in 1970 claiming damages in consequence of a fire destroying the said sawmill.

It was not disputed that because of the security situation in the area that one platoon from the 11th Infantry of the Royal Military Forces occupied an empty shed belonging to the sawmill, on February 23, 1970, for the purpose of conducting a military operation in the area. It was also not disputed that at the time of such occupation the sawmill and the shed had been abandoned by the owners and their employees because of the curfew in the area. It was again not disputed that the platoon vacated and left the shed at about 4.00 o'clock in the morning of 28th of May, 1970 and that the fire broke out in the main building of the sawmill at about 11.00 o'clock in the morning of May 29, 1970. (Some 31 hours later).

The main issues in the claim are whether the armed forces and consequently the government by negligence caused the fire to the sawmill; whether the government is absolved from any liability in view of section 5 of the Emergency (Essential Powers) Ordinance 1969 read with section 6(2) of Government Proceedings Ordinance 1956; and the quantum of damages if they were so negligent and not absolved.

I will deal with section 5 of the Emergency (Essential Powers) Ordinance 1969 first, now referred to as the Ordinance.

It was argued by the Federal Counsel, on behalf of the government that this section provides absolute protection to public officers for any act done during an emergency for the purpose of maintaining order or public security so long the act was done in good faith and it was reasonably necessary for the purpose intended. The relevant portion of section 5 of the Ordinance provides:

"5. No suit, prosecution or other legal proceeding shall lie in any court against any public officer either personally or in his official capacity for or on account of or in respect of any act ordered or done by him or purported to have been ordered or done by him during the emergency period for the purpose of maintaining order or public security or of carrying into effect any regulation, order, rule, by-law, direction or notice made or issued under this Ordinance, ...

Provided that the act of such officer or person was done in good faith and in a reasonable belief that it was necessary for the purpose intended to be served thereby."

This section of the Ordinance no doubt, gives indemnity to public officers for the purposes intended therein during an emergency. That the whole country at the time of the incident was in a state of emergency seemed to be an accepted fact by virtue of the proclamations, P.U.(A) 146 and 148 of 1969 — see *Government of Malaysia* v. *Mahan Singh*[1] and *Johnson Tan Han Seng* v. *Public Prosecutor*[2] and this emergency is in law still existing. But whether an act of expropriation of private property without paying compensation by the armed Forces is intended to be indemnified by the section of the Ordinance, is to my mind doubtful. Indeed if it were so, it would contravene Article 13 of Federal Constitution on the rights to compensation when private property is so acquired.

By construing section 8 of the Ordinance which provides that the powers conferred by the Ordinance were to be in addition to and not in substitution for other powers conferred under other laws, it would seem that this indemnity is not without limitation beside those referred to in the proviso. One of these other laws is section 53 of Internal Security Act, 1969, which provides for taking possession of lands or buildings by the Minister in the interest of public security and section 68 which provides for assessment for payment of compensation for such properties, taken into possession.

It is to be noted that the curfew imposed in the area at the time was in exercise of powers under Regulation 13A of the Preservation of Public Security Regulations 1963. Such be the case, Regulations 19(1) and 40 are also applicable on taking of possession of lands and buildings within the curfew area.

With these in view, I would hold that the indemnity provided in section 5 of the Ordinance does not cover the act of taking possession and occupation of the shed belonging to the sawmill by the armed forces in the present case. Abdul Razak J's decision in *Zahrah bte Hussin* v. *Government of Malaysia*[3] is distinguishable on different facts of the case.

The next issue is whether the armed forces were negligent when the fire broke out at the sawmill. In

this issue the facts are clear that the fire occurred 31 hours after the armed forces had vacated the shed which they had earlier occupied.

The evidence shows that the only inflammable materials brought by the soldiers during their occupation of the shed were small-packed stoves (Exhibit D1) which were provided with low flame fuel lasting 8 hours for each use. The soldiers had done their last cooking at 5.30 p.m. on May 27, 1970. They went to bed by 7.00 p.m. except for the sentries, and by 4.00 a.m. the following day (May 28, 1970) they vacated the shed. There was a lapse of 10½ hours and in my opinion if there had been any fire started by cooking the previous day it would have been apparent long before they vacated the shed. This is taking into consideration that the fire could possibly be started by any spilled fuel on the sawdusts scattered around the shed, at the time.

PW2 said that he first saw the smoke coming out from the direction of his house or the sawmill at about 11.30 a.m. on the 28th of May 1970 while he was in his farm some distance away. He also said that on two earlier occasions he had seen smoke coming out from the compound of the sawmill, which turned out to be burnt sawdusts. From these evidence, it would be pure deduction that if there had been slow fire started from the sawdusts in the vicinity, assuming that it was caused by the soldiers before they left, PW2 would have seen the smoke even before he went to his farm on the 28th morning.

Considering the intervening period between the time when the soldiers vacated the shed and the time the fire took place at the sawmill, I would consider that there were opportunities for other factors to occur which have caused the fire to the sawmill.

For these reasons I find that the defendant was not negligent as alleged. As counsel on behalf of the plaintiff has assured the court that this action was not maintained for trespassing by the armed forces on the sawmill, I would therefore dismiss this claim with costs.

Claim dismissed.

Solicitors: *Ee & Lim.*

ABU BAKAR BIN HAJI YUSUF v. MOHAMED HAMZAH BIN HANAPIAH & ANOR.

[O.C.J. (Syed Agil Barakbah J.)
January 21, April 1 and April 22, 1978]

[Alor Star — Civil Suit No. 260 of 1977]

Practice and Procedure — Striking out proceedings — Discretionary power — Extent to which court entitled to exercise power — Whether affidavits admissible — Whether statement of defence vexatious — R.S.C. 1957, O. 19 r. 27 & O. 25 r. 4.

The plaintiffs applied in the Summons-in-Chambers that the Statement of Defence dated September 3, 1977 be struck out as being frivolous and vexatious and filed merely to delay a fair and early trial; that the plaintiffs be at liberty to enter interlocutory judgment and to proceed to assess damages against both the defendants and for costs and other reliefs. The plaintiffs, as administrators of the estate of the deceased, Hasbullah bin Abu Bakar, had filed a claim for damages against the defendants under sections 7 and 8 of the Civil Law Ordinance, 1956, for the benefit of the estate as well as for the benefit of the dependants of the deceased, who died from injuries suffered as a result of a motor accident alleged to have been caused by the negligent driving of the 1st defendant of motor-car KC 4850 as the servant or agent of the 2nd defendant on June 1, 1975.

Held: (1) the discretionary powers of the court in relation to striking out proceedings of this nature are provided by Order 19 rule 27 and Order 25 rule 4 of the Rules of the Supreme Court 1957. As a general rule, the order under the above rules is an interlocutory order. It is only in plain and obvious cases that recourse should be had to this summary procedure. The mere fact that the case is weak and unlikely to succeed is no ground for striking out a pleading;

(2) under Order 25 rule 4, where the allegation is that the Statement of Claim discloses no reasonable cause of action, only the plaint and its documents alone should be considered and all allegations in it should be assumed to be true. It must be tried upon the allegations contained in the pleading, and evidence in support of the applicant's case is not admissible;

(3) where the ground for striking out the Statement of Claim is that it discloses no reasonable cause of action, no affidavit is admissible. However, with regard to the second limb of the rule relating to frivolous and vexatious action, the inherent jurisdiction of the court remains unaffected under Order 19 rule 27. Affidavits are admissible not by virtue of the rule, but by virtue of the general jurisdiction of the court. The court is entitled to look at the affidavits as to the history of the matter, and if in that light, the action was vexatious or frivolous, the pleading could be struck out and the action dismissed. In this case taking into consideration the above principles, the court was entitled not only to look at the pleadings but also to the affidavits filed in order to enable the court to consider the application in its proper perspective;

(4) in this case it was premature at that stage to regard the negligent acts alleged by the defendant as being standard defence, in the absence of determining other relevant factors and surrounding circumstances immediately before the accident. It was for the defendant to prove the particulars of such negligence on the part of the deceased, as pleaded in the defence. In a claim for damages for negligent acts of this nature, it is not safe for the court to base on the sketch plan and Police Report alone in order to determine whether the defendant is solely negligent or the deceased was also liable for contributory negligence as pleaded in the Statement of Defence. Therefore it was necessary to hear extrinsic evidence in open court by calling witnesses who will have to be examined, cross-examined and re-examined with a view to deciding the whole issue fairly and justly.

Cases referred to:-

(1) *Peck* v. *Russel & Ors.* [1923] 4 F.M.S.L.R. 32.

(2) *Attorney-General of the Duchy of Lancaster* v. *London & North Western Railway Co.* [1892] 3 Ch. D. 274 @ 278.

(3) *Republic of Peru* v. *Peruvian Guano Co.* (1887) 36 Ch. D. 489.

(4) *Re Vernazza* [1959] 2 All E.R. 200.

(5) *Re Vernazza* [1960] 1 All E.R. 183.

CIVIL SUIT.

Baldev Singh for the plaintiffs.

Lal Harcharan Singh for the defendants.

Syed Agil Barakbah J.: In this Summons-in-Chambers, the plaintiffs apply that the Statement of Defence dated September 3, 1977 be struck out as being frivolous and vexatious and filed merely to delay a fair and early trial; that the plaintiffs be at liberty to enter interlocutory judgment and to proceed to assess damages against both the defendants; for costs and other reliefs. The plaintiffs, as administrators of the estate of the deceased, Hasbullah bin